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No. 09-840

In the Supreme Court of the United States

HARDIE'S FRUIT AND VEGETABLE CO.-SOUTH, LP,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals permissibly exercised its discretion when it denied petitioner's request for vacatur of decisions of the Court of Federal Claims (CFC) and the Small Business Administration after petitioner's appeal of the CFC's decision became moot.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 3
Conclusion 9

TABLE OF AUTHORITIES

Cases:

Allied Painting & Decorating Co., SBA No. SIZ-3026, 1998 WL 219932 (S.B.A. 1988) 8
Alvarez v. *Smith*, 130 S. Ct. 576 (2009) 5, 6, 9
Arizonans for Official English v. *Arizona*, 520 U.S. 43 (1997) 5
Great W. Sugar Co. v. *Nelson*, 442 U.S. 92 (1979) 5
Jade Trading, LLC v. *United States*, 598 F.3d 1372 (Fed. Cir. 2010) 4
Kaw Nation v. *Norton*, 405 F.3d 1317 (Fed. Cir. 2005) ... 4
Khodara Envtl., Inc. v. *Beckman*, 237 F.3d 186 (3d Cir. 2001) 6
National Black Police Ass'n v. *District of Columbia*, 108 F.3d 346 (D.C. Cir. 1997) 6, 7
Staley v. *Harris County*, 485 F.3d 305 (5th Cir.), cert. denied, 552 U.S. 1038 (2007) 6
U.S. Bancorp Mortgage Co. v. *Bonner Mall P'ship*, 513 U.S. 18 (1994) 5, 6
United States v. *Munsingwear, Inc.*, 340 U.S. 36 (1950) 9
Westmoreland v. *National Transp. Safety Bd.*, 833 F.2d 1461 (11th Cir. 1987) 9

Statute, regulations and rule: Page

Small Business Act, 15 U.S.C. 631 *et seq.* 2
28 U.S.C. 2106 ..... 4, 5
13 C.F.R.:
Section 121.406(b) 2
Section 121.1004(a) 8
Sup. Ct. R 10 4

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 13-14) is unreported, but is available at 2009 WL 5606132. The order of the Court of Federal Claims (Pet. App. 15-19) is unreported. The decision of the Small Business Administration (Pet. App. 20-30) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 14, 2009. A petition for rehearing was denied on October 1, 2009 (Pet. App. 11-12). The petition for a writ of certiorari was filed on December 30, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Defense Logistics Agency (DLA), a component of the Department of Defense, solicited bids to supply fresh fruits and vegetables to numerous government facilities in 12 separate regions of the country. Pet. App. 15-16, 21. Under regulations promulgated by the Small Business Administration (SBA) pursuant to the Small Business Act, 15 U.S.C. 631 *et seq.*, competition for the contracts was limited to small businesses. See Pet. App. 21.

The SBA regulations provide that, in order to qualify for a supply contract of this kind, a small business must, *inter alia*, make the end-product itself or purchase it from another small business. 13 C.F.R. 121.406(b). That requirement is known as the "nonmanufacturer rule." Pet. App. 26. The SBA may grant a solicitation-specific waiver of that requirement if no small business can provide a product meeting the specifications of the contract. *Ibid.* The DLA sought and obtained a waiver of the nonmanufacturer rule for the fruit and vegetable solicitation at issue here. *Id.* at 27.

2. The DLA awarded the contract for the San Antonio region to M&S Foods Ltd. Co (M&S). Petitioner then filed a "size protest" with the SBA, alleging that M&S did not meet the small-business requirements because it relied on a large business for storage and distribution services in fulfilling the contract. Pet. App. 21. The SBA Office of Hearings and Appeals determined that the "critical question" was whether the applicable waiver of the nonmanufacturer rule was limited to the purchasing of produce from a large business or also extended to storage and delivery services. *Id.* at 27. Noting that the waiver was specific to this particular procurement, the SBA concluded that, under the terms of

the solicitation, the waiver applied to the entire procurement, including warehousing and delivery. *Id.* at 28-29. Accordingly, the SBA found M&S to be a small business for purposes of this procurement and rejected petitioner's size protest. *Id.* at 29.

3. Petitioner challenged the SBA's decision in the United States Court of Federal Claims (CFC). The CFC found the SBA's decision to be reasonable and ruled in favor of the government. Pet. App. 18. Petitioner then appealed to the United States Court of Appeals for the Federal Circuit.

4. After briefing but before oral argument in the court of appeals, DLA decided for reasons unrelated to this litigation to cancel the procurement for the San Antonio region. See Pet. C.A. Suggestion of Mootness & Req. for Vacatur, Ex. 1 (Suggestion of Mootness). The cancellation rendered moot the issues on appeal. Petitioner filed a motion for voluntary dismissal and for vacatur of the trial court and SBA decisions.

The government agreed that voluntary dismissal of petitioner's appeal was appropriate, but it opposed the vacatur request. The court granted the dismissal but denied, without opinion, petitioner's request for vacatur. Pet. App. 13-14. The court subsequently denied petitioner's request for panel rehearing and for rehearing en banc. *Id.* at 11-12.

ARGUMENT

The court of appeals' unpublished order denying the motion to vacate is not precedential, contains no legal analysis, and creates no conflict with any decision of this Court or any other court of appeals. In the particular circumstances of this case, moreover, the order represents a permissible exercise of the court of appeals'

judgment on a matter within its equitable discretion. Accordingly, further review is unwarranted.

1. Petitioner's motion to vacate was denied in an unpublished order signed for the Court by the Clerk. Pet. App. 13-14. The order includes no discussion or legal analysis, but simply states in relevant part that, upon consideration of the motion to vacate and the United States' opposition, "[t]he motion to vacate is denied." *Id.* at 14. The order thus does not set forth any legal principles that could conflict with the precedents of this Court or other courts of appeals, and it does not purport to decide any question of federal law "that has not been, but should be, settled by this Court." Sup. Ct. R. 10. Nor does petitioner suggest that this case reflects any pattern or practice by the court of appeals. In a precedential decision issued approximately eight months after the decision in this case, the Federal Circuit vacated a portion of a trial court's judgment that had become moot in order to clear the path for future relitigation. See *Jade Trading, LLC* v. *United States*, 598 F.3d 1372, 1381 (2010). See also, *e.g.*, *Kaw Nation* v. *Norton*, 405 F.3d 1317, 1323-1325 (Fed. Cir. 2005) (vacating agency decision that became moot on appeal).

There is consequently no need for this Court's intervention in this case.

2. The court of appeals' denial of the motion to vacate was a permissible exercise of equitable discretion under the circumstances of this case.

Under 28 U.S.C. 2106, a federal court of appeals "may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review." While Section 2106 authorizes vacatur of lower-court judgments, it does not specify any circumstance under which vacatur is required. See

Alvarez v. *Smith*, 130 S. Ct. 576, 581 (2009) (describing Section 2106 as "flexible").

As petitioner explains, vacatur is typically an appropriate remedy when mootness prevents a party from pursuing an appeal of a lower-court ruling. See, *e.g.*, *Alvarez*, 130 S. Ct. at 581; *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 71-72 (1997); *Great W. Sugar Co.* v. *Nelson*, 442 U.S. 92, 93 (1979) (per curiam). This Court has made clear, however, that because vacatur is an equitable remedy, its use in particular cases reflects the exercise of judicial discretion rather than the application of rigid rules. For that reason, vacatur of a lower-court (or administrative) judgment is not automatic when an appeal becomes moot before decision.

In *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U.S. 18 (1994) (*Bancorp*), the Court explained that it has "disposed of moot cases in the manner most consonant to justice in view of the nature and character of the conditions which have caused the case to become moot." *Id.* at 24 (ellipsis, internal quotation marks, and citation omitted). The Court in *Bancorp* held that, as a general matter, "mootness by reason of settlement does not justify vacatur of a judgment under review." *Id.* at 29. The court explained that a losing party who chooses to settle "has voluntarily forfeited" his right of appeal and has "thereby surrender[ed] his claim to the equitable remedy of vacatur." *Id.* at 25. The Court emphasized, however, that its holding was not absolute because "the determination is an equitable one, and exceptional circumstances may conceivably counsel in favor of" vacatur even when mootness results from settlement. *Id.* at 29.

Conversely, while vacatur is ordinarily appropriate when mootness occurs through "happenstance," *Ban-*

corp, 513 U.S. at 23, 25, the Court has not held that vacatur is categorically required in that circumstance. The Court in *Bancorp* stated that the party seeking this form of relief bears the "burden" of demonstrating "equitable entitlement to the extraordinary remedy of vacatur." *Id.* at 26. Courts of appeals have likewise recognized that "vacatur is an equitable remedy rather than an automatic right." *Khodara Envtl. Inc.* v. *Beckman*, 237 F.3d 186, 194 (3d Cir. 2001) (Alito, J.); *National Black Police Ass'n* v. *District of Columbia*, 108 F.3d 346, 351 (D.C. Cir. 1997) (same); see *Staley* v. *Harris County*, 485 F.3d 305, 310 (5th Cir.) ("vacatur is to be determined on a case-by-case basis, governed by facts and not inflexible rules"), cert. denied, 552 U.S. 1038 (2007).

Petitioner asserts (Pet. 6) that "vacatur is always appropriate where mootness results from the unilateral action of the prevailing party below." Whatever the merits of that legal theory, it does not govern this case because the mootness here was not caused by the "unilateral action of the prevailing party." Although the United States was the named defendant in the CFC, petitioner's challenge was to a determination of the SBA. See Pet. App. 15-16. The procuring agency that cancelled the solicitation at issue was the DLA, which had no involvement in the present lawsuit challenging SBA's determination. See *id.* at 15-16, 21-22.

The case was mooted for reasons unrelated to this litigation by the "unilateral action" of a federal agency, DLA, that is not a party to the suit. See Suggestion of Mootness, Ex. 1. This case therefore involves mootness by "happenstance" rather than by the "unilateral action of the prevailing party." Cf. *Alvarez*, 130 S. Ct. at 581 (Court finds "mootness through 'happenstance'" where,

in challenge to constitutionality of state procedures for seizure of property without a warrant, parties resolved underlying property disputes for reasons unrelated to the pending federal lawsuit.); *National Black Police Ass'n*, 108 F.3d at 352 ("The mere fact that a legislature has enacted legislation that moots an appeal, without more, provides no grounds for assuming that the legislature was motivated by * * * a manipulative purpose.").

Because the court of appeals did not issue an opinion or otherwise explain its decision to deny petitioner's request for vacatur, it is not clear how the court weighed the equities. As the government pointed out in its opposition to vacatur, however, such relief was unnecessary to ensure that petitioner could assert any legal challenge it might have if it were injured by a similar size determination in a future procurement. See Gov't Resp. to Suggestion of Mootness 2-3 (Gov't Resp.).[1] The dispositive question in the CFC involved the scope of the SBA's waiver of the nonmanufacturer rule. As petitioner noted before the SBA, the scope of the waiver is specific to the particular solicitation to which it applies. Pet. App. 23 ("size determinations are procurement specific"); *id.* at 27 ("this is an individual waiver specific to this procurement"). Thus, in resolving this case, the CFC addressed

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[1] In opposing petitioner's request for vacatur in the court of appeals, the government also argued that vacatur of the challenged administrative decision "could result in confusion and uncertainty at the SBA regarding the legitimacy of" similar SBA size determinations. See Gov't Resp. at 3-4. That concern, however, does not provide an independent justification for the court of appeals' refusal to vacate the decisions below. Properly understood, vacatur for mootness does not suggest disagreement with the ruling that is vacated, and the possibility that a vacatur order could be misconstrued is not a sufficient reason to deny that equitable remedy if it is otherwise appropriate.

only the application of the particular waiver at issue to the successful bid by M&S.

DLA has now cancelled the procurement for the San Antonio region that it awarded to M&S. That cancellation had the effect not only of mooting petitioner's challenge to the award but also of rendering irrelevant the individual waiver attached to the underlying procurement.[2] Any future procurement for which petitioner might compete will be governed by a new waiver (if the SBA chooses to waive the nonmanufacturer rule), and the interpretation of that waiver will not be controlled by the CFC's decision. Thus, the cancellation of the procurement at issue, which rendered the waiver null, left petitioner free to challenge any future award based on the terms of any subsequent waiver.[3]

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[2] As noted above, see p. 2, *supra*, the DLA sought separate bids for 12 different regions of the country, and the procurements for other geographical areas resulting from that solicitation are governed by the same waiver as the one at issue below. The existence of those other procurements, however, does not create any meaningful likelihood that a subsequent dispute will arise in which the judicial and administrative decisions below would be given preclusive effect. Petitioner did not challenge any of the other awards that were based on the solicitation, and it is now time-barred from doing so. See 13 C.F.R. 121.1004(a) (providing that size protests must be made within five business days of the date on which the prospective awardee is announced).

[3] Petitioner cites the SBA's decision in *Allied Painting & Decorating Co.*, SBA No. SIZ-3026, 1998 WL 219932 (S.B.A. 1988), in arguing that, if the decisions of the CFC and SBA are not vacated and DLA issues a new solicitation for the same procurement, petitioner's protest of that solicitation will be barred. Pet. 7-8. In *Allied Painting*, the protestor's first size protest concerned the legal question whether, in making a size determination, average annual receipts of the business's affiliates should be considered. In a later size protest involving the same parties, the protestor raised the same legal argument, and the SBA held the argument to be barred as *res judicata*. Here, unlike in *Allied Painting*,

As a general matter, vacatur of moot cases (outside the settlement context) is appropriate because it "clears the path for future relitigation of the issues between the parties." *Alvarez*, 130 S. Ct. at 581 (quoting *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 40 (1950)). Because vacatur was not necessary to accomplish that purpose in this case, the court of appeals did not abuse its equitable discretion in denying such relief. See, *e.g.*, *Westmoreland* v. *National Transp. Safety Bd.*, 833 F.2d 1461, 1463 (11th Cir. 1987) (per curiam) (noting that, "[r]ather than apply[ing]" the vacatur rules "automatically," courts "should look to the policies behind *Munsingwear* * * * to see if they are implicated"). And for essentially the same reason, any error the court may have committed in declining to vacate the decisions of the SBA and the CFC lacks any practical significance and does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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the SBA and CFC decisions are specific to the waiver at issue in this procurement. Neither the SBA nor the CFC set forth any general legal principles that would be binding upon petitioner (or any other protestor) in the protest of a future solicitation.